78-1859

IN THE

SUPREME COURT OF THE UNITED STATES

October Term , 1978

Numbers 78-1575
79-1162

GREY LINE AUTO PARTS, INC

Petitioner

v.

SAMUEL T. THARP, ERNEST L. STRICKLAND, BRUCE H. SNEAD, J. WAYNE DICKERSON, and EARL H. SNEAD, INC., A Virginia Corporation

Respondants

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

E. Brodnax Haskins
706 Mutual Building
Richmond, Virginia 23219

Counsel for Petitioner

and

W. Griffith Purcell
1012 Mutual Building
Richmond, Virginia 23219
Member of the Bar of this Court

SUBJECT INDEX

TABLE OF CASES

Grey Line Auto Parts, Inc. prays that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals For The Fourth Circuit entered in the above numbered cases, on April 19, 1979.

OPINION BELOW

The opinion of the United States Court of Appeals is not published but attached hereto in Appendix Pages i - iii.

JURISDICTION

The judgments of the Court of Appeals for the Fourth Circuit was made and entered on April 19, 1979 and copies thereof are attached to this Petition in the Appendix Pages iv - v. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

WERE THE RESPONDANTS EVER DAMAGED BY THE PETITIONER?

The uncontradicted evidence of the trial of the action in the United States District Court revealed that Petitioner, Grey Line Auto Parts, Inc. placed every item of inventory into the inital business operation of the Respondant, Samuel T. Tharp. This stock in trade was utilized as the capital from which Tharp conducted his busienss by the repeated sale of these high volume items for a period of one year. Thereafter, Tharp never having paid for the initial inventory, received the entire stock in trade for another outlet for which he gave a token payment. Thereafter Tharp returned for full credit, over Thirty Thousand Dollars worth of inventory, more than he had received initially, and he still owed this Petitioner more than

Seventy Thousand Dollars on open account after the return of inventory and at the time of trial.

While the other Respondants made some payment for inventory received, when the amount of inventory received together with the amount of initial payment is balanced against the amount of inventory returned together with the amounts owed the petitioner on open account. The fact is demonstrated overwhelmingly that no Respondant here could have suffered damage at the hand of or by any act of the Petitioner.

SUBSIDIARY QUESTIONS INCLUDE:

1. Are damages presumed from the anti-trust violation?
2. If all reasonable men, exercising an unprejudicial judgment would draw the conclusion from the facts that the Respondants were not damaged, could they suffer damages?

STATUTE INVOLVED

The statute involved in this petition is 15 USC §15.

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT

This case concerns the effort of Grey Line Auto Parts, Inc., based upon the idea of its president, to meet the competition of national mass merchandisers, by furnishing capital via the placement of the stock in trade consisting of automobile parts, into the business of each of five persons. Contractual arrangements des-

cribed the placement of this inventory into each business without cost or with relatively little inital cost to any operator. For a period of over one year, each operator received free use of the inventory to sell and replace each item without cost. In addition, each operator received limitless credit on open account upon the most liberal payment terms.

After utilizing this stock in trade for many months, these Respondants returned the inventory for full credit. In addition, these respondants each owed the Petitioner large sums of money for open account purchases which were never paid. Both the return of inventory and the open account balances were effected long before the cases were consolidated and tried.

Throughout the trial of the action and the appeal to the United States Court of Appeals for the Fourth Circuit, the Peti-

tioner urged the legal proposition that the Respondants herein could not possibly prove that they were damged because damages cannot exist unless a loss occurs. In short, the Respondants were never damaged, they were benefited by the Petitioner.

The Respondants here brought action in the United States District Court for the Eastern District of Virginia for violation of the Sherman Act, (15 U.S.C. §15, previously recited). This furnished the basis for federal jurisdiction. All cases were consolidated and all judgments together with the separate judgments for counsel fees were consolidated for appeal. The judgments from the District Court total Two Hundred Forty Thousand Dollars ($240,000.00).

REASON FOR ALLOWANCE OF THE WRIT

To prevent the undue tax upon the time of this Court, the Petitioner stands ready to abandon every assignment of error made at the trial and

in the Circuit Court except the question of whether the Respondants were ever damaged.

The Petitioner relies upon the previous rulings of this Court, especially in anti-trust cases, that the difficulty in ascertaining the exact amount of damage is a risk properly cast upon the wrongdoing defendant. However, this Court also holds that proof of the injury is always the plaintiff's burden.

The case of *Story Parchment Co. v Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931) contains one point which approaches the point the Petitioner makes in this petition by the following language in 282 U.S. p. 562, 51 S.Ct. p. 250; 75 L.Ed. 544:

> The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong not those damages which are definately attributable to the wrong and

> only uncertain in respect of their amount.

Another case which almost reaches the Petitioner's point here is *Keogh v. Chicago & N.W.R. Co.*, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183.

> Under §7 of the Anti-trust Act...recovery cannot be had unless it is shown that as a result of defendants' acts, damages in some amount susceptible by expression in figures resulted. These damages must be proved by facts from which their existence is logically and legally inferable...

In sum, the Petitioner urges that its acts of putting the Respondants in business was not a restraint of trade but a promotion of trade. The terms upon which the stock in trade was placed in each business permitting the return for full credit of all inventory and to which right of return all Respondants availed themselves long before trial, receiving full credit for the returned merchandise; then such returns removed the possibility of any

legal damage or injury as a matter of law.

Petitioner believes that the facts recited herein are not subject to dispute, that no injury to the Respondants ever existed and that its failure to carry this point in the Fourth Circuit Court of Appeals is perplexing to it. It finds the point is so basic that argument is more difficult than upon more complex issues. It is fully aware that the opinion rendered in this case is normally not susceptible by review of this Court. Nevertheless, it respectfully submits that the United States Court of Appeals for the Fourth Circuit has decided this federal question in a way which conflicts with applicable decisions of this Court and further the Court of Appeals of the Fourth Circuit has rendered a decision in this case which is in conflict with another Court of Appeals on the same matter.

In *World of Sleep v. Stearns and Foster Co.*, 525 F.2d 40 (10th Cir. 1975) on page 43 of the Report the following language appears.

> It is well-established that an essential element for recovery under the anti-trust laws is that the claimant be injured or damaged and a violation of the act without resultant injury is not enough.
>
> See Gray v. Shell Oil Company, 469 F.2d 742 (9th Cir. 1972), cert denied, 412 U.S. 943, 93 S.Ct. 2773, 37 L.Ed.2d 403 (1972); Nationwide Auto Appraiser Serv. v. Association of C. & S., 382 F.2d 925 (10th Cir. 1967); and Winckler & Smith Citrus Products Co. v. Sunkist Growers, Inc., 346 F.2d 1012 (9th Cir. 1965).

CONCLUSION

For the reasons stated above, it is respectfully submitted that this petition for Writ of Certiorari should be granted.

GREY LINE AUTO PARTS, INC.

By E. Bradnax Haskins
Counsel

CERTIFICATE

I hereby certify that I have this 14th of June, 1979, mailed 3 copies of the foregoing Petition for Writ of Certiorari to Charles F. Witthoefft, Esquire, Hirschler, Fleischer, Weinberg, Cox and Allen, 2nd Floor, Massey Building, 4 North 4th Street, Richmond, Virginia 23219.

E. Bundrow Haskins

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 78-1575

Samuel T. Tharp, Ernest L. Strickland, Bruce H. Snead, J. Wayne Dickerson, and Earl H. Snead, Inc., a Virginia Corporation, Appellees,

-v-

Grey Line Auto Parts, Inc., a Virginia Corporation, Appellant.

No. 79-1162

Samuel T. Tharp, Ernest L. Strickland, Bruce H. Snead, J. Wayne Dickerson, and Earl H. Snead, Inc., a Virginia Corporation, Appellees,

-v-

Grey Line Auto Parts, Inc., a Virginia Corporation, Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. D. Dortch Warriner, District Judge.

Argued April 3, 1979 Decided April 19, 1979

Before BUTZNER, WIDENER and HALL, Circuit Judges.

E. Brodnax Haskins (Wicker, Haskins and Hutchens on brief) for appellant; Charles F. Witthoefft (Hirschler, Fleischer, Weinberg, Cox & Allen on brief) for appellees.

PER CURIAM:

In this appeal of an action based on the Sherman Act, the issues concern the propriety of the damages awarded by the jury. The appellant concedes that it violated the Act, but it contends: (1) that the evidence establishes that the plaintiffs could not have suffered any damages; (2) that the amount of damages, if any, was too speculative and uncertain for proper jury determination; (3) that the damages should have been reduced in the amount of the reasonable value of certain services rendered by the defendant that allegedly benefited the plaintiffs; (4) that the defendant's exhibits did not conform to the pretrial order.

Upon consideration of the briefs, the record, and oral argument, we find no error warranting reversal. Consequently, we affirm the judgment for damages in No. 78-1575 and the award of attorney's fees in No. 79-1162.

JUDGMENT

United States Court of Appeals

for the

Fourth Circuit

No. 78-1575

Samuel T. Tharp, Ernest L. Strickland, Bruce H. Snead, J. Wayne Dickerson, and Earl H. Snead, Inc., a Virginia Corporation,

Appellees.

vs.

Grey Line Auto Parts, Inc., a Virginia Corporation,

Appellant.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

FILED

APR 19 1979

WILLIAM K. SLATE, II
CLERK

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United States Court of Appeals

for the

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No. 79-1162

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED

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U. S. COURT OF APPEALS
FOURTH CIRCUIT

No. 78-1575

Samuel T. Tharp, Ernest L. Strickland, Bruce H. Snead, J. Wayne Dickerson, and Earl H. Snead, Inc., a Virginia Corporation,

Appellees,

versus

Grey Line Auto Parts, Inc., a Virginia Corporation,

Appellant.

No. 79-1162

Samuel T. Tharp, Ernest L. Strickland, Bruce H. Snead, J. Wayne Dickerson, and Earl H. Snead, Inc., a Virginia Corporation,

Appellees,

versus

Grey Line Auto Parts, Inc., a Virginia Corporation,

Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. D. Dortch Warriner, District Judge.

Upon motion of the appellant, by counsel, and for cause shown,

IT IS ORDERED that the mandate in the above-entitled case be, and it is hereby, stayed for an additional fifteen (15) days to and including June 14, 1979, pending application of the appellant in the Supreme Court of the United States for a writ of certiorari to this Court.

For the Court - by Direction.

William K. Slate II

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